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No. 95-388

In The Supreme Court of the United States

OCTOBER TERM, 1995

ANTHONY BROWN, *et al.*,
Petitioners,
v.
PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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November 1995

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Major League Baseball Players Association ("MLBPA") has for many years been recognized as the exclusive bargaining representative for all major league baseball players. Because respondents here have refused to consent to the MLBPA's filing of a brief *amicus curiae*, the MLBPA seeks leave to file the following brief *amicus curiae* in support of the petition for *certiorari* in the above-captioned case. The grounds for this motion are as follows:

1. At present, major league baseball's reserve system enjoys a unique exemption from the federal antitrust laws by virtue of this Court's decision in *Federal Baseball Club v. National League*, 259 U.S. 200 (1922). *Federal Baseball Club* was reaffirmed in *Flood v. Kuhn*, 407 U.S. 258, 282 (1972).

2. Since *Flood* was decided, courts have considered the breadth of professional baseball's antitrust exemption. *See Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993); *Butterworth v. National League of Professional Baseball Clubs*, 644 So. 2d 1021 (S. Ct. Fla. 1994). And, in the interest of its members, the MLBPA has petitioned Congress to enact legislation making plain that the antitrust laws apply to professional baseball. In August 1995, the Senate Judiciary Committee voted to approve the The Major League Baseball Antitrust Reform Act of 1995, S. 627. That bill, which would remove professional baseball's special exemption from the antitrust laws, will be placed on the calendar of the Senate as soon as the Committee's report is filed. A companion bill is pending consideration before the House Judiciary Committee. A similar bill passed the House Judiciary Committee in September 1994, but was not acted upon by the full House before that Congress ended its session.

3. In light of the MLBPA's ongoing efforts with respect to professional baseball's antitrust exemption, the issues raised by the petition for *certiorari* are of critical importance to the MLBPA. S. 627 provides only that the antitrust laws that apply to all other businesses also "apply to the business of professional major league baseball." *See* section 27(a). And, the majority opinion in *Brown v. Pro Football, Inc.*, 50 F.3d 1041 (D.C. Cir. 1995) ("*Brown*"), holds that professional athletes forfeit their rights under the antitrust laws if they are represented by an exclusive bargaining representative.

4. In addition, as the exclusive bargaining representative in the only professional sport where the employers assert that the antitrust laws do not apply, the MLBPA is uniquely situated to address the important questions raised by the petition for *certiorari*. As a result of the decision in *Flood*, the MLBPA has extensive knowledge of labor relations in the professional sports context when employers do not feel in any way restrained by the antitrust laws. Not coincidentally, major league baseball has

suffered eight successive lockouts and/or strikes. The bargaining parties have not concluded a new collective bargaining agreement without a work stoppage since 1970, and baseball is the only professional sport to have lost its post-season championship, the World Series, to labor-management strife.

5. In our brief, we show that the rule adopted in *Brown* will have significant destabilizing effects on labor relations in the sports and entertainment industries. We also show that the *Brown* court decided an important and recurring question of federal law—the proper harmonization of federal labor policy and federal antitrust policy—in a manner that departs from principles well established by this Court. We urge in the accompanying brief that this Court grant *certiorari* to settle the law in this area.

Wherefore, the MLBPA respectfully requests that its motion for leave to file a brief *amicus curiae* in support of petitioners be granted.

Respectfully submitted,

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BRIEF OF MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This brief *amicus curiae* in support of petitioner is filed by the Major League Baseball Players Association ("MLBPA"), the exclusive bargaining representative for all major league baseball players. The interest of the MLBPA is set out in the accompanying motion for leave to file brief *amicus curiae*.

REASONS FOR GRANTING THE WRIT

The rule adopted by the court below and by the Second Circuit Court of Appeals, *see* note 1 *infra*, will have significant destabilizing effects on the conduct of labor relations in the sports and entertainment industries. That rule marks a profound departure from the principles crafted

by this Court. Rather than harmonizing the federal labor laws and the federal antitrust laws as it was required to do, the court below enlarged the nonstatutory labor exemption from the antitrust laws beyond the confines established by this Court. The lower court's rule would disserve both statutory schemes: Employees would be deterred from exercising rights established by the National Labor Relations Act ("NLRA") for the protection of employees; and unreasonable anticompetitive conduct by groups of employers, which would otherwise violate the federal antitrust laws, would be shielded from the prohibitions of those laws. This case merits plenary consideration by this Court.

A. The respondents, the Clubs of the National Football League ("NFL"), agreed among themselves to fix the salaries of petitioners, football players on the Clubs' developmental squads, at $1000 per week. Absent this anticompetitive agreement, the developmental squad players would each be free individually to negotiate compensation with an NFL Club, and the amount of that compensation would be determined by the forces of the free market.

The District Court held that the Clubs' agreement was "significantly anticompetitive in its effect" and lacked any procompetitive justification. Pet. App. 110a-114a. The court rejected respondents' reliance on the nonstatutory labor exemption from the antitrust laws, because (i) there was no collective bargaining agreement between the Clubs and petitioners' union, the NFL Players Association; (ii) the parties had reached impasse on the issue of petitioners' compensation; and (iii) the NFL Players Association had never agreed to fixed salaries for petitioners. *Id.* at 72a-80a, 86a-90a.

A divided panel of the Court of Appeals reversed. *Brown v. Pro Football, Inc.*, 50 F.3d 1041 (D.C. Cir. 1995) ("*Brown*"). For the majority, Chief Judge Edwards held that "the nonstatutory labor exemption

shields from antitrust challenge alleged restraints on competition imposed through the collective bargaining process, so long as the challenged actions are lawful under the labor laws and primarily affect only a labor market organized around a collective bargaining relationship." *Id.* at 10a.[1] In dissent, Judge Wald maintained that the majority's holding constitutes an unwarranted expansion of this Court's limited nonstatutory labor exemption that will undermine federal labor and antitrust laws. App. 48a-49a.

B. There are two compelling reasons that the petition for *certiorari* in this case should be granted: First, *Brown* and *Williams*, if they stand, will have the effect of significantly destabilizing labor relations in the sports and entertainment industries and will undermine, rather than serve, the interests that the federal labor laws are intended to protect. Second, *Brown* and *Williams* resolve an important and recurring question regarding the harmonization of the federal labor and antitrust laws in a manner that departs from the principles established by this Court's decisions.

1. *Brown* holds that members of a multiemployer group who agree to engage in conduct in their labor market that violates the antitrust laws are exempt from those laws *solely* because their employees exercise the right under the NLRA to be represented by a union. Such employees may gain the right to assert antitrust claims against the multiemployer group only if the union ceases to be the employees' exclusive collective bargaining representative. *See Brown*, 50 F.3d at 1057 ("if employees wish to seek the protections of the Sherman Act, they may forego unionization or . . . decertify their unions"). The practical effect of this decision is to de-

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[1] In so doing, the majority followed a recent decision of the Court of Appeals for the Second Circuit, *Williams v. National Basketball Ass'n*, 45 F.3d 684 (2d Cir. 1995) ("*Williams*").

stabilize labor relations in the sports and entertainment industries.

In professional football, as in most other sports and entertainment industries, the union has determined that the best way to maximize union members' economic interests is to preserve the right of each member individually to negotiate and contract for his own salary so that each member can exert leverage based on his unique skills and personal contributions. *See J.I. Case v. National Labor Relations Board*, 321 U.S. 332, 338 (1944) ("Of course, where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours *or expressly to leave certain areas open to individual bargaining*") (emphasis added). Prior to the decisions in *Brown* and *Williams*, sports and entertainment unions and their individual members operated under the assumption that each individual's right to negotiate and agree to compensation with an employer was protected from unreasonably anticompetitive employer conduct by the antitrust laws.

If *Brown* and *Williams* stand, that assumption becomes incorrect. At critical moments in the collective bargaining relationship—such as the crucial junctures where a collective bargaining agreement expires and where an impasse in bargaining is reached—unions and union members would have to weigh whether the members' interests would be best served by terminating the union's status as the exclusive bargaining representative so that members could assert their individual rights under the antitrust laws. Unions and employers would bargain in an atmosphere where at any moment the bargaining relationship could disappear.

Far from being a remote possibility, this scenario has already occurred. Informed by the Court of Appeals for the Eighth Circuit that their antitrust rights had been extinguished, *see Powell v. NFL*, 930 F.2d 1293 (8th

Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), NFL players decertified their union for six full seasons. *See* App. 30a, 48a. And, after *Williams* was decided, professional basketball experienced its first work stoppage when the NBA locked out the players in response to a petition for decertification of the exclusive bargaining representative. *See* Pet. 28 & n.12.

This Court should take this case to resolve whether the significant destabilizing effect of *Brown* and *Williams* is the result that Congress intended.

2. Under the decision below, employees in the sports and entertainment industries are required to choose between the protections of the system of labor relations established by the NLRA or the protections against unreasonable anticompetitive restraints provided by the antitrust laws. Under principles established by this Court, however, employees are not required to make such an election. Instead of harmonizing the NLRA and the antitrust laws, the *Brown* court's rule unduly expands the nonstatutory labor exemption, thereby undermining both statutory schemes.

a. By providing that employees who exercise their statutory right under the NLRA to choose a bargaining representative automatically forfeit their right to the protections of the antitrust laws in the labor market, the rule adopted below would discourage employees from using the very processes that the NLRA is designed to foster.[2]

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[2] As this Court stated in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753-54 (1985) (quoting from section 1 of the NLRA), the NLRA is intended to "encourage the practice and procedure of collective bargaining and . . . protect [] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection." *See also e.g., American*

This Court has often held that state laws may not burden the NLRA right of self-organization by providing a benefit or entitlement to nonunionized employees that is not provided to unionized employees: "It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).[3]

Similarly, this Court has observed that federal laws providing for minimum employment standards apply without regard to whether employees are or become unionized: "Nor has Congress *ever* seen fit to exclude unionized workers and employers from laws establishing federal minimum employment standards." *Metropolitan Life*, 471 U.S. at 755 (emphasis added). *See also Livadas*, 114 S. Ct. at 2081 ("[A]s we observed in *Metropolitan Life*, the widespread practice in Congress and in state legislatures has assumed the contrary, bestowing basic employment guarantees and protections on individual employees without singling out members of labor unions (or those represented by them) for disability.").

There is no principled basis for singling out the antitrust laws for treatment different from that received by federal safety and health, pension, and antidiscrimination laws, as the *Brown* court has done. Absent some express statement by Congress, employees do not lose the benefit of the statutory rights that they have as individuals sim-

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Hospital Ass'n v. National Labor Relations Board, 449 U.S. 606, 609 (1991) ("The central purpose of the Act was to protect and facilitate employees' opportunity to organize unions to represent them in collective-bargaining negotiations.").

[3] *Accord Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19-22 (1987); *Livadas v. Bradshaw*, 114 S. Ct. 2068, 2081-82 (1994).

ply because they are represented by a union. The antitrust laws contain no such exclusion.[4]

b. There is no express provision in the labor laws or the antitrust laws that exempts the challenged actions of the NFL Clubs from the application of the antitrust laws.[5] Nevertheless, the *Brown* court decided that the NFL Clubs' actions are protected from antitrust scrutiny by virtue of the nonstatutory labor exemption to the antitrust laws. In so deciding, *Brown* would enlarge the nonstatutory labor exemption well beyond the confines established by this Court's decisions.

This Court created the nonstatutory exemption to address a particular and defined area of tension between labor law and antitrust law. That tension arises when a union—in furtherance of the legitimate interests of its members—enters into an agreement with a group of

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[4] On this point, we cannot improve upon the words of the United States in its brief urging the Supreme Court to grant *certiorari* in *Powell*:

> Neither the text nor the history of the NLRA fairly suggests that Congress implicitly intended broadly to deprive unionized workers of the antitrust laws' protection from employer-imposed restraints on competition in the labor market. The text of the NLRA does not mention the antitrust laws, and the legislative history demonstrates no intent to restrict the preexisting rights of workers as the price of participation in a collective bargaining relationship—rights that presumably would continue to exist for other, non-unionized workers. To the contrary, the predominant thrust of the statute (and of related enactments such as the *Norris-LaGuardia* Act) is to expand the protection afforded employees.

Brief for the United States as *Amicus Curiae* at 13-14 (Dec. 1990).

[5] The labor laws and the antitrust laws do contain express provisions exempting certain unilateral *union* activities from the reach of the antitrust laws. *See* 15 U.S.C. § 17; 29 U.S.C. §§ 52, 104. *See generally United States v. Hutcheson*, 312 U.S. 219, 232 (1941) (statutory exemption for union activity applies "[s]o long as a union acts in its own self-interest and does not combine with non-labor groups").

employers that enables the employers to engage in anti-competitive conduct that would violate the antitrust laws if done by the employers on their own. In that "very narrow" area, *Allen Bradley Co. v. Local Union No. 3, IBEW*, 325 U.S. 797, 801 (1945), the antitrust laws, which seek to foster competition, are in tension with the labor laws, which permit unions to bargain with groups of employers and to further the interests of the employees they represent by removing certain terms and conditions of employment from competition among the employers.

The nonstatutory labor exemption adopted by this Court has been carefully crafted in a series of cases to relieve that tension, without unnecessarily undermining the achievement of either statute's objectives, by shielding the parties to such agrements from antitrust liability only where the agreements are reached through *bona fide*, arm's length collective bargaining. *See Allen Bradley, supra; United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America v. Jewel Tea Co.*, 381 U.S. 676 (1965); *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, United Ass'n of Journeymen of the Plumbing & Pipefitting Indus.*, 421 U.S. 616 (1975); *H.A. Artists & Assos., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704 (1981).

The *Brown* court acknowledged that antitrust prohibitions apply to anticompetitive practices in a labor market just as they do in a product market.[6] The court nonetheless found this Court's cases defining the nonstatutory labor exemption to be of only marginal relevance because they involve injuries to businesses that asserted that they were being injured by anticompetitive conduct in the

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[6] *See, e.g., Radovich v. National Football League*, 352 U.S. 445, 453-54 (1957); *Anderson v. Shipowners Ass'n*, 272 U.S. 359 (1926); *Mackey v. National Football League*, 543 F.2d 606, 616-18 (8th Cir. 1976); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978).

product market, whereas here the asserted injuries are to employees in the labor market. *See* 50 F.3d at 1050 ("the Court consistently has struggled to balance the interests of those involved in collective bargaining against the impact of their activities on the *product market*, paying little attention to any impact on the *labor market*").

But this Court's cases rest on the principle that the nonstatutory labor exemption should not be used to immunize employer groups from antitrust liability for unilateral anticompetitive actions taken solely for the employers' own interests, *without the consent of the union involved*. *See Allen Bradley*, 325 U.S. at 800 ("Quite obviously this combination of business men has violated both §§ 1 and 2 of the Sherman Act, unless its conduct is immunized by the participation of the union."); *Jewel Tea*, 381 U.S. at 689-90 (a collective bargaining agreement provision restricting the hours of operation of competing food store owners "is so intimately related to wages, hours and working conditions that the union's successful attempt to obtain that provision through bona fide, arm's length bargaining in pursuit of their own labor union policies" is within the nonstatutory labor exemption to the antitrust laws) (White, J.) (plurality opinion). *See also Pennington*, 381 U.S. at 661-66; *Connell*, 421 U.S. at 622.

In *Brown* and *Williams*, the courts of appeals thus would create a far more expansive antitrust exemption than anything contemplated by this Court, much less by the antitrust and labor statutes themselves. Under the rule adopted below, the nonstatutory labor exemption would shelter unreasonably anticompetitive conduct by a group of employers to which the union had never at any time consented. Such a rule would both deter the exercise of rights established by the NLRA and shield anticompetitive conduct that the antitrust laws are intended to prohibit.

C. As the experience of major league baseball demonstrates, *see* MLBPA's Motion for Leave to File Brief

Amicus Curiae, the rule adopted below has substantial deleterious consequences for labor relations in the sports and entertainment industries. And the rule represents a profound departure from the principles established by this Court to govern the harmonization of federal labor and antitrust laws. This case merits the Court's plenary consideration.

CONCLUSION

For the foregoing reasons, the petition for *certiorari* to the United States Court of Appeals for the District of Columbia Circuit should be granted.

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